No. 83-1935

In The

Supreme Court of the United States

October Term, 1983

TONY AND SUSAN ALAMO FOUNDATION, TONY ALAMO, SUSAN ALAMO, AND LARRY LAROUCHE,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Is an individual an "employee" as defined by the Fair Labor Standards Act when he renders services to a religious or charitable organization on a voluntary basis with no expectation or desire of compensation or wages in any form as a result of such services?

2. Is an individual an "employee" as defined by the Fair Labor Standards Act because he volunteers his services to a religious or charitable organization if such services are rendered by others who receive compensation for the same services from other organizations?

3. Should the Fair Labor Standards Act and its provisions be applicable to a religious or charitable organization when it uses the services of volunteers?

4. Is the application of the Fair Labor Standards Act to the petitioners violative of the Free Exercise of Religion Clause of the First Amendment to the United States Constitution?

5. Is the application of the Fair Labor Standards Act to the petitioners violative of the Establishment Clause of the First Amendment to the United States Constitution?

6. Is the Secretary of Labor's attempted application of the Act to the petitioners a willful and oppressive denial of that equal protection of the law, which is secured to the petitioners, as to all other persons, by the Constitution of the United States?

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OPINIONS DELIVERED BELOW

The opinion of the United States District Court for the Western District of Arkansas is reported at 567 F. Supp. 556 (1982) and is printed in its entirety in Appendix A at page App. 1-40 of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, herein docketed on May 25, 1984, as Case No. 83-1935. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 722 F. 2d 397 (1983) and is printed in its entirety in the aforesaid Appendix A at pages App. 48-63.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit (See Appendix A of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, App. 47 herein filed) was entered on December 5, 1983. Both parties to this action filed timely petitions for rehearing which were denied by Order of the United States Court of Appeals for the Eighth Circuit on March 1, 1984. The Petition for Writ of Certiorari was filed herein on May 25, 1984, and was granted on October 15, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

U. S. Const. Amend. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. Amend. V. No persons shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Statutes

28 U. S. C. § 1291
29 U. S. C. § 201
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Senate Report No. 145, 87th Cong. 1st Sess. (1961) reprinted in 1961 U. S. Code Cong. & Admin. News, 1620, 1660.

Senate Report No. 1487, 89th Cong. 2d. Sess. (1966) reprinted in 1966 U. S. Code Cong. & Admin. News, 3027.

(Only citations for the above list of statutes, regulations, and other authorities are provided at this point; unless otherwise indicated, their pertinent text is set forth in Appendix C to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, herein docketed on May 25, 1984.)

STATEMENT OF THE CASE

The Tony and Susan Alamo Foundation was founded by the petitioner, Tony Alamo, and his wife, Susan Alamo, now deceased, and was incorporated under the laws of the state of California on January 29, 1969. (*See,* Appendix below, hereinafter referred to as Appendix D, App. 1-9.) Subsequent to its incorporation, the Foundation applied for, and received, a certificate of authority to conduct its affairs in the state of Arkansas. As set forth in its Articles, the express purposes of the Foundation are:

> To establish, contain, and maintain an Evangelistic Church; to conduct religious services, . . . to educate, ordain, support, and appoint ministers, evangelists, missionaries, and workers in connection therewith, . . . to build, equip, and operate trade schools and workshops and co-ordinate with allied institutions. . . . (*See,* Appendix D, App. 2.)

On December 18, 1974, the Foundation secured an exemption from taxation under § 501(c)(3) of the Internal Revenue Code as a corporation organized and operated exclusively for religious purposes with none of its net earnings inuring to the benefit of any private shareholder or individual. (*See,* Appendix A, App. 2, of Petition for Writ of Certiorari, hereinafter referred to simply as "Appendix A", and *see* Appendix D, App. 12-15.) Such tax exempt status has not been altered, amended, canceled, or revoked, but has been maintained since that time (J.A. 93, 94).

As found by the District Court, the Foundation is "an outgrowth of the evangelistic efforts of Tony and Susan Alamo". (*See,* Appendix A, App. 6.) The Foundation has established churches throughout the United States (Record of Transcript of Court Proceedings held April 28-30, 1982, hereinafter referred to simply as "R", Vol. II, p. 201) and sends individuals across the country to witness and testify about Christian principles and doctrines in rest homes, hospitals, reformatories, and detention centers (R. Vol. II, p. 201). The founder, Tony Alamo, contends that the Foundation is "the strongest soul winning work in the country" (J.A. 93).

The Foundation's evangelical activities are performed by approximately three hundred individuals who are generally referred to as "associates". Prior to their association with the Foundation, most were addicted to or users of drugs or engaged in criminal activity. As found by the District Court, the work of the Foundation, through Tony and Susan Alamo, provided spiritual and moral assistance to these individuals. (*See,* Appendix A, App. 7.) The associates, however, are only a fraction of the people who have been converted, encouraged, or assisted by the Foundation (J.A. 94, 95).

The associates can be distinguished from other individuals who are or were influenced by the Foundation's ministries in that they (the associates) desire to become evangelists or pastors and to "give their life to the Lord" (J.A. 94) and in that they live on Foundation property. As stated by Tony Alamo, before these individuals are taken into the Foundation, they must "convince us without shadow of a doubt" that they "really want to become evangelists, . . . [or] pastors, [and] that [they] want to give their life to the Lord" (J.A. 94).

Though the Foundation receives contributions from the public, it does not solicit them. (*See,* Appendix A, *Memorandum and Order,* App. 8.) One source of income is the operation of the following:

ACTIVITY	TYPE OF ACTIVITY	LOCATION
Alamo Discount Grocery	Retail sales of groceries	Alma, AR
Alamo Construction	Construction	Alma, AR
Alamo Telegraph	Western Union	Alma, AR
Alamo Auto Repair	Vehicle Repair	Alma, AR
Alamo Freight	Freight-trucking	Alma, AR
Alamo Ready-Mix	Ready-mix concrete	Alma, AR
Alamo Farms	Hog farms	Alma, AR
Alamo Roofing	Roofing construction	Alma, AR
Alamo Record Company	Production of records	Alma, AR
Fort Smith Mobile Nursery	Landscaping	Alma, AR
Alamo DX	Service station	Alma, AR
Alamo Restaurant	Restaurant	Alma, AR
Alamo of Nashville	Retail sales of clothing	Nashville, TN
Tennessee Boy	Distribution	Nashville, TN

Though the annual gross volume of sales derived from the activities listed above exceeds $250,000.00, the net operating result was, and continues to be, a loss (R. Vol. II p. 200).

The Secretary contends, and the District Court held, that the above activities are a part of an "enterprise" within the meaning and definition of Section 3(r) of the Act (29 U.S.C. § 203(r)) in that the Foundation operated the activities as businesses under common control for common business purposes. Despite the District Court's conclusion of "enterprise", it made the following findings:

> The Foundation secured an exemption from taxation under 501 (c) (3) of the Internal Revenue Code as a corporation organized and *operated exclusively for religious purposes with none of its net earnings inuring to the benefit of any private shareholder or individual.* (*See, Memorandum and Order,* Appendix A, App. 2, emphasis ours.)
>
> . . .
>
> The Foundation is an outgrowth of the evangelistic efforts of Tony and Susan Alamo. (*See, Memorandum and Order,* Appendix A, App. 6.)

The petitioners contend that the above-listed activities are merely extensions of the Foundation's ministries in that they provide the associates, who were addicted to drugs or engaged in criminal activity, a forum for rehabilitation and a forum for spreading their religious beliefs. Consequently, each separate activity is viewed by the associates as a "church in disguise". In addition, these activities serve the needs of the associates. For example, the restaurant provides, without charge, meals to the associates and their families, as the clothing store freely provides clothing. Many of the activities, though labeled

"commercial enterprise", are operations maintained solely for the benefit of the associates. One such operation is the "Alamo Sewing Room", which was found by the District Court to be a business. The "Alamo Sewing Room" was described, however, by one of the associates as follows: "[T]hat was a sewing bee, like a sewing circle. Women got together; my wife participated in it, went down there and sewed clothes for my little boy, and things like that (R. Vol. II, p. 193).[1]

The Secretary of Labor contends that these activities are related and are conducted for a common business purpose and thus comprise an "enterprise" as defined by Section 3(r) of the Fair Labor Standards Act. 29 U.S.C. § 203(r). The petitioners maintain that these activities were created and are operated exclusively for religious purposes. Notwithstanding the Secretary's position, these activities have been accepted by the Internal Revenue Service as activities related to the Foundation's exempt (religious) purpose (R. Vol. II, p. 202).

The overwhelming majority of the work performed in the operation of these activities is done by the associates. Most of the associates' time, however, is spent in religious activity such as reading the Bible, witnessing, and testifying (J.A. 72-74; J.A. 90).

The associates testified at trial that they consider their association with the Foundation to be ministerial training (J.A. 94). Furthermore, the associates consider their services in the operation of these activities to be on a voluntary basis, without expectation or desire of wages or compensation in any form (J.A. 62; J.A. 78, 79; J.A. 92).

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[1] This is the only evidence presented to the District Court that described the nature of the "Alamo Sewing Room".

As found by the District Court: "The Secretary failed to produce any past or present associates of the Foundation who viewed his work in the Foundation's various commercial businesses as anything other than 'volunteering' his services to the Foundation." (*See, Memorandum and Order,* Appendix A, App. 7.)

The associates do receive benefits from the Foundation in the form of lodging, meals, medical care, clothing, furnishings, and child care.

The Secretary of Labor contends, and the District Court so held, that the associates are "employees" as defined by the Fair Labor Standards Act. The petitioners contend (1) that the associates are not covered by the Act, and (2) that any attempted application would be constitutionally prohibited as well as improper.

On December 19, 1977, in the United States District Court for the Western District of Arkansas, the Secretary of Labor initiated an action against the Tony and Susan Alamo Foundation, Tony Alamo, and Susan Alamo (its officers and founders), and Larry LaRouche, an associate of the Foundation, allegedly in accordance with Section 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 217, for alleged violations of Sections 6, 7, 11, and 15 of the Fair Labor Standards Act (29 U.S.C. §§ 206, 207, 211, and 215).

Other than the petitioners, the alleged violations concern two groups of individuals. The first group is composed of eighteen individuals who were undeniably employees as defined by the Act. These individuals were from "outside" the Foundation and were hired to render specific services. The members of this group throughout

the trial were referred to as "outside workers". The question involving this group was whether the wage received by the "outside workers" was sufficient to meet the minimum wage and overtime provisions of the Fair Labor Standards Act (R. Vol. I, p. 12). The second group is comprised of approximately three hundred individuals who live on Foundation property and who call themselves volunteers. As stated above, the word "associates" was, and is, used to identify the members of this group. (*See, Memorandum and Order,* Appendix A, App. 6, footnote 2.) The Secretary of Labor contends that back wages totaling approximately nineteen million dollars ($19,000,000.00) are due the associates.

On December 13, 1982, and several months following the actual trial of this case, the District Court entered its decision in a forty page *Memorandum and Order.* (*See,* Appendix A, App. 1-40.) As to the "associates", the District Court found them to be "employees" as defined by the Fair Labor Standards Act and directed the defendants and the Secretary to supply each associate with written notice advising "any associate who desires to submit a claim in the form of an affidavit within 45 days of mailing of the notice. . . ." (*See, Memorandum and Order,* Appendix A, App. 39.) The claim would be reduced by the value of the applicable benefits (e.g., lodging, board, etc.) received by each associate. (*See, Memorandum and Order,* Appendix A, App. 40.) On December 23, 1983, the petitioners, seeking the reversal of the orders entered below, filed a Notice of Appeal in the United States Court of Appeals for the Eighth Circuit in accordance with the Federal Rules of Appellate Procedure. On January 13, 1983, the respondent filed Plaintiff's *Motion for Clarification and Amendment of Memorandum Decision and for*

Entry of Judgment. The District Court granted said *Motion,* entered an *Order* modifying the aforesaid *Memorandum and Order,* and entered a *Judgment.* The petitioners accordingly refiled their Notice of Appeal, and the respondent filed his Cross-Appeal seeking a restitutionary injunction.

After considering the parties' Briefs and after hearing oral argument, the United States Court of Appeals for the Eighth Circuit on December 5, 1983, filed its opinion wherein the District Court's Order of December 13, 1982, was vacated and remanded, in part, for determination of the amounts of wages due the associates; such determination to be based either upon the present record or on the record supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer.

Petitions for rehearing were timely filed by both parties, and both were denied as set forth in the *Order* of the Court of Appeals for the Eighth Circuit entered and filed on March 1, 1984.

SUMMARY OF ARGUMENT

I. The Fair Labor Standards Act and its provisions are not applicable to the services performed by the petitioner, Larry LaRouche, or by the other associates of the petitioner Foundation since such services were done without expectation for or desire of compensation or wages. The fact that the associates received food and shelter during the time the services were performed does not force the "employee" label upon them as their services were not for such provisions.

II. Many of the services performed by the associates were performed in a setting that could be considered commercial in nature. Notwithstanding, the voluntary nature of the associates' work should not have been disregarded in light of *Walling v. Portland Terminal Company,* 330 U.S. 148 (1947).

III. The petitioner, the Tony and Susan Alamo Foundation, is a non-profit organization that has secured tax exempt status under 501(c) (3) of the Internal Revenue Code as an organization organized and operated exclusively for religious purposes. Furthermore, the Foundation's activities ("businesses") operate at a loss and are maintained for a forum from which the associates can testify of their religious beliefs and are utilized for the purpose of rehabilitating most of the associates. Accordingly, the label of "employer" or "enterprise" upon the foundation as defined by the Fair Labor Standards Act is improper.

IV. The application of the Fair Labor Standards Act to the petitioners burdens their right to freely exercise their religious belief. Considering the circumstances surrounding the living conditions of the Foundation's associates and the desires of the associates, the requested application is without lawful justification and, consequently, violates the Free Exercise of Religion Clause of the First Amendment.

V. In light of the record keeping requirements of the Act, together with its wage provisions, application of the Act to the petitioners will result in excessively and unconstitutionally entangling government with activities of American churches.

VI. This attempted application of the Act to the petitioners is an arbitrary action that bears no reasonable relation to the purposes sought to be achieved through the Act. It is common knowledge that all religious organizations use the services of volunteers in performing tasks that may be viewed as commercial in nature. In singling out the petitioners, the Secretary violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment.

ARGUMENT

I.

The Petitioner, Larry LaRouche, And The Other Associates Of The Foundation Volunteered Their Services To The Foundation Without Expectation Of Wages Or Compensation In Any Form And, Accordingly, Should Not Have Been Declared To Be "Employees" As Defined By The Fair Labor Standards Act.

As noted above, there are, and at all times relevant to this action were, approximately three hundred (300) individuals associated with the defendant Foundation. These individuals, referred to as associates, generally, serve as witnesses or evangelists and assist and staff the Foundation's churches and missionaries throughout the United States (J.A. 94, 95). Though there are many other individuals who attend and worship at the Foundation's churches and missions, the Secretary of Labor concerns himself only with the associates. The salient issue in this case is whether the associates are "employees" as defined by the Fair Labor Standards Act.

Pursuant to the Court's pre-trial order of March 20, 1982 (J.A. 39), the defendants called three associates to testify concerning their relationship with the Foundation, with the understanding and agreement that their testimony would be representative of all the associates of the Foundation. The Secretary of Labor was given the opportunity to call any associate who would testify differently from the three representative associates.[1] The three who testified in such representative capacity were Bill Levy, Ann Elmore, and Edward Mick (R. Vol. II, pp. 70-194).

In describing the nature of work he did for the petitioner Foundation, Bill Levy testified:

> I volunteer my services in whatever capacity I can be of use; I witness and testify; I go to church services; I seek baptisms with souls; I read with young Christians; I go out on the street and bring the gospel of love to people. . . . I go out on witnessing chains and bring the message to the lost and dying in convalescent hospitals and jails, on the street, witnessing and testifying, whatever. In whatever capacity I am, the main thing that I do is witness for the Lord Jesus Christ (J.A. 49).

Furthermore, Mr. Levy stated he volunteered his services on the Foundation's hog farm (J.A. 50).

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[1] THE COURT: Why don't you pick out two or three of them, and we will assume that if the ones whose statements were furnished testified on that issue they would testify the same way. How will that be, Mr. Fitz? MR. FITZ: I don't suppose there would be any problem with that, Your Honor. THE COURT: Mr. Fitz, if you find some among that group you think would testify to the contrary, of course, you are free to call them (J.A. 39).

Ann Elmore, in describing her activities with the Foundation, stated:

> Well, my main and sole interest is to preach the gospel to other people who are like I was, that they may have that same thing, that they might be saved. So whatever I do,—the first four and a half or five years at the Foundation, I did nothing but read the Bible and pray. I'd go out in the streets and witness and testify. That was all I did the first five years (J.A. 73).

Mrs. Elmore also stated: "I volunteered my time waitressing at our restaurant. And I loved working up there, because I was a witness for the Lord (J.A. 80)."

Ed Mick made the following statements regarding his service for the Foundation:

> I witness and testify. I go out on witnessing chains, hospital wards, intensive care wards, to the streets, the highways, the byways, pass out gospel literature, and compel people to come into the house of the Lord.
>
> . . .
>
> I do some other activities if I am needed, or if I see a place where I can volunteer my services, I cheerfully do so.
>
> . . .
>
> Yes, I have on occasions [worked at the restaurant]. I've gone in and fry cooked, wherever I could help out (J.A. 90).

Tony Alamo, in describing the character of the individual who is accepted by the Foundation and the purpose behind that individual's association with the Foundation, testified as follows:

> [W]e are not out to get people to come to the Foundation, to feed people. And those that volunteer, that say they really want to serve the Lord with all their heart, soul and mind, and body, that really want to become evangelists, that want to become pastors, that want to give their life to the Lord, then they have to convince us without a shadow of doubt before we ever take them in (J.A. 94).

Though the associates admittedly received no wages for their labors, they and their families were provided with food, shelter, clothing, transportation, and medical benefits by the Foundation.

With reference to the benefits he and his family received and in response to the question of whether he expected compensation in the form of these benefits or in any other form, Bill Levy stated:

> [B]ut even if I didn't get such great benefits, I would still do what I am doing because it's my belief in the Almighty.
>
> . . .
>
> I've never expected any compensation, any wages, nor do I even expect to receive any compensation or wages for what I do, for what I do for the ministry of God (J.A. 62).

When Ann Elmore was asked if she expected such benefits as food and shelter, she stated:

I didn't come in—I had gave up much more comfortable circumstances in the so-called world than I was coming into. But I was willing to do that. *I didn't care if I never had another material thing as long as I lived. I wanted to do what was right in the eyes of God. . . . And no one expected any kind of compensation,* and the thought is totally vexing to my soul. It would defeat my whole purpose (J.A. 78, 79). (emphasis ours)

Mrs. Elmore's "purpose" behind her work was not to receive compensation in any form, but was "to do what was right in the eyes of God".

The third associate to testify in a representative capacity was Ed Mick. Mr. Mick made the following remarks regarding the alleged expectation of wages, compensation, or tangible benefits:

I have never had any expectations of compensation nor wages.

. . .

Q. *You don't expect compensation at this time?*

A. *I would not even consider it.*

Q. *Do you expect compensation for some of your activities in the future?*

A. *Never ever* (J.A. 92). (Emphasis ours)

After hearing their testimony and after reading the depositions of several former associates, the District Court found:

The Secretary of Labor failed to produce any *past or present* associate of the Foundation who

viewed his work in the Foundation's various commercial businesses as anything other than "volunteering" his services to the Foundation. Typical of the associates' attitude about the Secretary's efforts in their behalf is that of Ann Elmore. *Mrs. Elmore testified convincingly that she considered her work in the Foundation's businesses as part of her ministry. She views the businesses as a vehicle for preaching, witnessing, and testifying in support of religious beliefs of those associated with the Foundation. She does not work for the Foundation for material rewards; she does it in furtherance of God's command to spread the gospel. Mrs. Elmore said that she never expected any compensation from the Foundation, and the thought of receiving wages for her work is "vexing to my soul".* (Appendix A, App. 7, 8.) (emphasis ours)

Despite these findings, the District Court concluded that the associates were "employees". The Act defines the term "employee" to mean "any individual employed by an employer". (*See,* 29 U.S.C. § 203(e) (1). The term "employ" is defined under the Act to include "suffer or permit to work". (*See,* 29 U.S.C. § 203(g).)

This Court, in the case of *Walling v. Portland Terminal Co.,* 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947), clarified the meaning of the phrase "suffer or permit to work", as follows:

The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees. . . . [S]uch a construction would sweep under the Act each person who, without promise or ex-

pectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these. *The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell the services for less than the prescribed minimum wage. Id.* at 330 U.S. 152. (emphasis ours)

The case of *Turner v. Unification Church,* 473 F. Supp. 367, aff'm. 602 F. 2d 458 (1st Cir. 1979) applied *Portland Terminal* to a factual situation similar[2] to the case at hand. In the *Turner* case, the District Court granted the Motion to Dismiss of the defendant, finding that the Complaint failed to state a claim upon which relief could be granted.

In her Complaint, the plaintiff, Shelley Ann Turner, alleged that she was forced to work long hours of compulsory service soliciting money and selling candies, flowers, and tickets for Unification Church rallies. For these efforts *she allegedly received no monetary compensation but was provided with food and shelter.* Viewing the allegations set forth in Turner's Complaint in their most favorable light, the Court, granting the defendant's Motion to Dismiss, stated:

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[2] The *Turner* case and the case under review are similar as to the facts directly relevant to the issue discussed under this point. The cases can be equated in that there was work performed in a "religious" setting and that the individual worker expected no wages or compensation. The similarities of the cases do not extend to religious doctrine, to methods of "recruiting" individuals, or to beliefs regarding solicitation of money.

In order to be covered by the F.L.S.A., plaintiff must be an "employee" as defined by 29 U.S.C. § 203. That section defines the term employee cryptically: "any individual employed by an employer." The term has been interpreted broadly, see *Rogers v. Schenkel,* 162 F.2d 596 (2d Cir. 1947), but *an employee must still be a "person whose employment contemplated compensation." Walling v. Portland Terminal Co.,* 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947). The plaintiff's complaint indicates that she never contemplated any monetary or tangible compensation from the Unification Church. Certainly, Turner's services cannot be termed voluntary or gratuitous as she was allegedly being held in involuntary servitude.

. . .

Despite the plaintiff's laudable desire "to create a better world", performing services for charitable purposes without expecting any tangible compensation does not give rise to an employer-employee relationship within the meaning of the F.L.S.A. Therefore, plaintiff cannot claim a cause of action under 29 U.S.C. § 216. *Id.* at 377. (emphasis ours)

It is well stated that a person who intends his services to be voluntary and to be rendered without compensation is not an "employee" within the meaning of the Fair Labor Standards Act. *(See also, Rogers v. Schenkel, supra; Bowman v. Pace Co.* 1 WH Cases 119 (5th Cir. 1941).)

In the case at hand, the District Court erroneously stated:

> Although the associates expected no compensation in the form of ordinary wages, they did expect the Foundation to provide them with food, shelter, clothing, transportation, and medical benefits. (Appendix A, App. 8.)

As in *Turner, supra,* the assoicates did receive food and shelter; however, the representative associates testified unequivocally, as noted above, that their efforts were not for material reward and were not given in expectation of benefits such as food and shelter.

Though given the opportunity, the Secretary of Labor failed to produce any associate who would testify that he expected wages or compensation in any form for his efforts. In this regard, the Secretary has failed to meet his burden of proof.

In determining whether an individual is an "employee", one must look to the laborer's intent or expectation. As stated in *Portland Terminal Co., supra,* the Fair Labor Standards Act directs itself to persons "whose employment *contemplated* compensation". The Secretary of Labor argues that the associates *expected* compensation for their labor. Yet, when the associates were asked what their expectations were, their testimony contradicted the Secretary's argument. If expectation is a consideration, which the petitioners believe it is, then the testimony of the representative associates about their expectations should not be ignored.

In an attempt to support his expectation argument, the Secretary states that the associates were totally dependent upon the Foundation and, thus, must have expected some benefits. The record, however, does not support his position. None of the representative associates or the former associates who testified stated that they were totally dependent upon the Foundation for financial support. Nowhere was the question even asked by the Secretary's attorneys. In fact, the record contradicts such an argument. As stated by the representative associates, it was not uncommon for the associates to go outside the Foundation to secure jobs. As stated by Bill Levy:

> A few of us would get together and possibly decide to go out and get a job. It may be planting trees or it may be —. I worked at Flanders Factory in Fort Smith, Arkansas (J.A. 51).

As stated by another representative associate, Ann Elmore, regarding the early portion of her association with the Foundation, she stated: "I had some money from an investment that I lived off of, and I had a very small amount of child support (J.A. 72)."

Donald McLean Wylie, a former associate of the Foundation who was deposed at the request of the Secretary of Labor, stated that he had his own income from a source outside the Foundation while he was living on Foundation property (J.A. 118). Consequently, the record does not support the argument or finding that the associates were totally dependent upon the Foundation for their existence.

The intent and expectations of the associates are clear. Each representative associate testified that it was his (or her) intent to volunteer his services. Each stated that his work was done for religious purposes and that

there was no expectation of wages or compensation in any form. Notwithstanding, the Secretary of Labor is attempting to impose an employee-employer relationship upon the associates and the Foundation. Is it the purpose of the Secretary of Labor to label all volunteer work "employment" so that work in any form or setting is subject to the Fair Labor Standards Act?

None of the associates claimed that they are entitled to wages in any form as a result of their labor. The Secretary of Labor, however, seeks to force the Foundation to pay wages to inviduals who neither expect nor desire the same. As stated by the District Court in its *Memorandum and Order* (Appendix A, App. 6), Mrs. Elmore's attitude was "typical of the associates' attitude about the Secretary's efforts in their behalf", and that to Mrs. Elmore the thought of receiving wages for her work is "vexing to my soul" (J.A. 79).

Accordingly, the assoociates should not have been found to be "employees", and their relationship with the Foundation should not have been labelled "employment".

II.

The District Court Improperly Disregarded The Voluntary Nature Of The Associates' Work Because Some Of The Work Was Done In Activities Customarily Considered "Commercial".

Throughout the District Court's *Memorandum and Order*, the phrase "commercial businesses" is utilized. The District Court appears to focus its concern on those associates who worked in the Foundation's "commercial businesses". In the aforesaid *Memorandum and Order*, the

District Court makes the following conclusions: "The people who worked in the Foundation's commercial businesses . . . are 'employees' of the defendants, Tony Alamo, Susan Alamo and the Foundation within the meaning of the Act." (*See*, Appendix A, App. 36, 37.) The District Court, however, should not have disregarded the voluntary nature of the associates' work simply because some of them might have worked in activities customarily considered "commercial". In the case of *Walling v. Portland Terminal Company, supra*, this Court found: "There is no question that these trainees do work in the kind of activities covered by the Act." 330 U.S. at 151, 91 L. Ed. at 812. Notwithstanding this finding, however, the trainees were held not to be "employees" under the Act as they performed services without promise or expectation of compensation.

In the case of *Rogers v. Schenkel, supra.*, the United States Circuit Court of Appeals for the Second Circuit found that the plaintiff "performed work in interstate commerce for the defendants" and that "his services were those of a helper doing plating work." *Id.* at 597. The court, however, also found that the plaintiff intended his services to be rendered without compensation. Accordingly, and in light of the *Portland Terminal* case, the Court of Appeals reversed the District Court's decision and found no basis for the legal conclusion that the plaintiff was an employee under the Fair Labor Standards Act, notwithstanding the "commercial" nature of the services performed.

Furthermore, in the case of *Turner v. Unification Church, supra.*, it was found that the plaintiff "worked long hours—'often more than 12 hours per day' of 'com-

pulsory services' soliciting money and selling such items as candy, flowers, and tickets for Church rallies". *Id.* at 371. For these efforts the plaintiff received no monetary compensation but was provided with food and shelter. Despite such efforts in activities that could be labelled "commercial", the Court found no employer-employee relationship to exist.

Each of the above-cited cases deal with individuals working in "commercial" activities. Yet, in each case, the Court found the intent and expectations of the parties to be controlling. As stated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944): "The law does not impose an arrangement upon the parties. It imposes upon the Courts the task of finding what the arrangement was." 323 U.S. at 137.

In attempting to justify the District Court's holding, the Secretary argues that the Foundation would be given an unfair advantage over possible competitors. He goes on to argue that the use of the volunteers in this setting deprives another worker from receiving compensation for the performance of the same task. The fallacy of this argument can easily be seen when one is forced to consider the church worker who drives the church bus to take the elderly to and from church services to be giving the church an unfair advantage over the local taxi companies that charge for transportation and to be depriving some taxi driver of his normal fare. The Secretary's reasoning would ultimately lead to a finding of competition between local restaurants and the church cafeteria that supplies meals prior to a church service. It leads one to the conclusion that the individual who volunteers one week of his time to remodeling a church home for the needy is depriving another

from a paying construction job. Such an argument has no basis in law and should be rejected by this Court.

The intent and expectation of the associates are clear. As in *Turner, supra.*, the associates performed services for charitable purposes, and as in *Portland Terminal, supra.*, and *Schenkel, supra.*, the associates had not contemplated, expected, or desired compensation for the services performed. In light of the above-cited cases, the associates should not be defined as "employees".

The District Court was in error when it found that the associates were employees as defined by the Fair Labor Standards Act. Based upon the unrefuted evidence, the District Court's legal conclusion in this regard was incorrect. Accordingly, the petitioners request the reversal of the decisions entered below.

III.

The Petitioner, The Tony And Susan Alamo Foundation, Should Not Have Been Found An "Enterprise" As Defined By The Fair Labor Standards Act Since It Is, And At All Times Relevant Hereto Was, A Non-Profit Religious Organization Exclusively Created And Operated For Religious Purposes.

Proof of an enterprise is a prerequisite to the establishment of a minimum wage (Section 6) or overtime compensation (Section 7) violation. (*See,* 29 U.S.C. § 206 and 207.)

Section 3(r) of the Fair Labor Standards Act (29 U.S.C. § 203(r) defines "enterprise" as follows:

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose.

The burden of proving enterprise coverage is upon the Secretary of Labor. (*See, Wirtz v. Kip's Big Boy,* 18 WH Cases 796 (1969).) The Act describes the following three elements that must co-exist before an "enterprise" can be found: (1) related activities; (2) unified operations or common control; and, (3) a common business purpose. (*See also, Marshall v. Elks Club of Huntington, Inc.,* 44 F. Supp. 957 at 966 (1977).)

The Secretary contends, and the District Court so concluded, that the activities of the Foundation were performed for a "common business purpose". The District Court, however, unequivocally found:

> The Foundation secured an exemption from taxation under § 501(c)(3) of the Internal Revenue Code *as a corporation organized and operated exclusively for religious purposes* with none of its net earnings inuring to the benefit of any private shareholder or individual. The exemption has been approved and certified by the Internal Revenue Service. (*See,* Appendix A to Petition for Writ of Certiorari, App. 2.) (emphasis ours)

To qualify for tax exempt status under Section 501(c)3, an organization must be *"organized and operated exclusively for religious,* charitable, scientific, testing for public safety, literary, or educational *purposes"*. I.R.C. § 501 (c) (3). (emphasis ours) As revealed by Defendants' Exhibit 31 (Letter of Exemption from the Internal

Revenue Service, *see,* Appendix D, App. 12-15) and by the testimony of Tony Alamo, the Foundation received its Certificate of Exemption from the Internal Revenue Service on December 18, 1974, and has maintained such tax-exempt status since that time (J.A. 93 and R. Vol. II, p. 197).

The District Court also found:

> The Foundation is an outgrowth of the evangelistic efforts of Tony and Susan Alamo. The affidavits of the "associates" of the Foundation provide *persuasive evidence* that the evangelistic work of the Alamos and/or the Foundation associates has provided spiritual and moral assistance to many people who lacked direction or purpose in their lives and some who were addicted to drugs or engaged in criminal activity. (*See,* Appendix A, App. 6, 7.) (emphasis ours)

The following testimony of Tony Alamo further evidences the non-commercial purposes of the Foundation's activities:

> Q. What you call "businesses", are they associated activities?
>
> A. The associated activities.
>
> Q. Are they profit making?
>
> A. We haven't made any profit on them, and we are a non-profit organization. We use the businesses as churches in disguise. People come in and we witness and testify to them. So they are not what you would call —
>
> Q. So you also use them for rehabilitation and other purposes?

A. Rehabilitation. And our Articles of Incorporation have been authorized to have workshops, rehabilitation workshops. And that's what they are (R. Vol. II, p. 200).

The fact that the Foundation's activities operate at a loss is further evidence of its non-commercial purpose.

These activities are primarily manned or operated by the associates. As pointed out in Point I above, it is difficult to view the reason behind the associates' affiliation with the Foundation as being anything but religious.

In light of the above, it should be concluded that the activities and operations of the petitioner, the Tony and Susan Alamo Foundation, do not fall within the meaning of the word "enterprise" as defined by Section 3(r) of the Fair Labor Standards Act (29 U.S.C. § 203(r)) in that it has not performed related activities for a common business purpose but has operated the aforesaid activities exclusively for religious purposes.

In the Senate Report explaining the meaning of the word "enterprise" as used in this Act, the following was stated: "Eleemonsynary, religious, or educational and similar activities of organizations which are not operated for profit are not included in the term 'enterprise' as used in this bill." S. Rept. No. 145, 87th Conf. 1st Sess. (1961), reprinted in 1961 U.S. Code Cong. & Admin. News pp. 1620, 1660. Cited in *Marshall v. Elks Club of Huntington, Inc., supra.*, at 967. *See also,* S. Rep. No. 1487, 89th Cong., 29 Sess. (1966), reprinted in 1966 U.S. Code Cong. & Admin. News, 3027.

The Foundation's activities are merely means by which the associates defray their living expenses during their

endeavor to promote religious doctrines and belief. The Foundation does not operate for a common business purpose. To the contrary, and as found by the District Court, the petitioner Foundation is "organized and operated exclusively for religious purposes". These activities do not operate at a profit but are supported by charitable donations to the Foundation. The Secretary has failed to meet his burden of proving the Foundation to be an enterprise as defined by the Act. Consequently, the petitioner Foundation is not an "enterprise engaged in commerce or in the production of goods for commerce" within the meaning and definition of Section 3(s) of the Act (29 U.S.C. § 203(s)).

IV.

The Application Of The Fair Labor Standards Act To The Petitioner Foundation And The Individual Petitioners Is In Violation Of The Free Exercise Of Religion Clause Of The First Amendment To The United States Constitution.

It is well settled by this Court that the Free Exercise Clause of the First Amendment is an absolute prohibition against governmental regulation of religious beliefs. *Wisconsin v. Yoder,* 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); *Sherbert v. Verner,* 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963); *Cantwell v. Connecticut,* 310 U.S. 296, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). Furthermore, the Free Exercise Clause has been found to provide substantial protection for lawful conduct grounded in religious belief. (*See, Wisconsin v. Yoder, supra; Thomas v. Review Board of Indiana Emp. Security Div.,* 450 U.S. 707, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981); *Sherbert v. Verner, supra.*

In highlighting the religious nature of the associates' affiliation with the Foundation, we direct the Court's attention to the following findings of the District Court as set forth in its *Memorandum and Order*. (*See,* Appendix A, App. 1-40.)

> The Foundation secured an exemption from taxation . . . as a corporation organized and operated exclusively for religious purposes. . . . (*See,* Appendix A, App. 2.)
>
> . . .
>
> The Foundation is an outgrowth of the evangelistic efforts of Tony and Susan Alamo. (*See,* Appendix A, App. 6.)
>
> . . .
>
> Practically all of the work performed . . . is done by the associates. . . . (*See,* Appendix A, App. 7; *see also,* Appendix A, App. 7, 8, which concerns the testimony of Ann Elmore.)

The associates desire no compensation for their labor at the Foundation as they consider their work a religious service. They simply want to volunteer their services in furtherance of the Foundation's religious ministries. The application of this Act in this situation violates the associates' right to freely exercise their religious beliefs in that it forces this religious institution to pay wages in prescribed amounts and forces the volunteer worker to accept the same, contrary to his religious convictions.

The requested application further burdens the religious activity of the associates with the detailed record keeping requirements of Section 11 of the Fair Labor

Standards Act (29 U.S.C. § 211), which would require the associates to maintain and keep records of their activities and to have such available for government inspection. To the associates, there is no question that the application of the provisions of the Act would burden the exercise of their religious belief.

As to being forced to receive compensation for her labors, Ann Elmore, one of the representative associates, testified:

> And no one ever expected any kind of compensation, and the thought is totally vexing to my soul. It would defeat my whole purpose (J.A. 79).

Bill Levy, another representative associate had the following to say about the requirement of a wage: "I believe it would be offensive to me to even be considered to be forced to take a wage. It would be an absolute offense to me (J.A. 62) . . . I believe it offends my right to worship God as I choose (J.A. 63)."

Edward Mick, the remaining associate who testified in a representative capacity, similarly noted his objection to the Secretary's demand that he receive a wage (J.A. 92).

In answering a question regarding the record keeping requirement of the Act, the representative associate, Bill Levy, testified:

> It would absolutely hinder me from following my religious convictions, my beliefs in God. In other words, I might be slopping the pigs and a truck driver comes in there, I've got to check off the time I stopped slopping the pigs and go over to the truck driver and write — record how long I talk to the truck driver to

witness to him about the Lord Jesus Christ, and then stop and check that off, and if I prayed with them, how long I prayed with them for. And then if I read the Bible with them, stop and check that off how long I read Bible. And before you know it, I would be just doing nothing but filling sheets all day long (J.A. 59).

Should the Fair Labor Standards Act apply to the Foundation, its activities, and its associates, the Act must also be applicable to (1) an individual who volunteers several hours each week to prepare meals for a church congregation on Sunday and Wednesday nights; (2) an individual who volunteers several hours each week to take the church youth to and from church services and related activities; (3) an individual who volunteers his time and effort to maintain the landscaping around the church building; (4) an individual who volunteers several hours each day to solicit pledges for the church budget; and so on and so on. Surely such application of the Fair Labor Standards Act infringes upon the rights and freedoms guaranteed to the American people by the United States Constitution.

Admittedly, not all overt acts prompted by religious beliefs or principles are free from legislative restrictions. The government may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. *(See, Wisconsin v. Yoder, supra.)*

As stated in *Sherbert v. Verner, supra.*, however:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount

interest, give occasion for permissible limitation". *Id.* U.S. at 406

No such abuse or danger has been presented here. The Secretary contends that the compelling interest for the governmental intrusion in this case is to protect all covered workers from labor conditions that are detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers.

The representative associates, however, had the following comments about their standard of living: Mr. Levy stated, "I live in a brand new five room house, two bedrooms, living room and kitchen-dining room (R. Vol. II, p. 94)." "We have a school that's provided free of charge, Christian school. . . . (J.A. 61)." "I was a heroin addict off the street . . . I put on maybe eighty pounds since I came to the church. And I am real healthy; my children are very healthy (R. Vol. II, p. 99)." Mrs. Elmore stated, "I live in an apartment house upon Georgia Ridge. It's a beautiful little townhouse. I have a two bedroom apartment, a fireplace, decorator furniture. I live there with my daughter and husband (R. Vol. II, p. 142)." Mr. Mick stated, "I have a three bedroom home, rock home, overlooking a five acre lake, that is newly built for me and my wife. . . . We have a beautiful home, washer, dryer, furniture . . . a custom built fireplace, plush carpets (J.A. 89)." The associates are certainly not in danger of falling below the "minimum standard of living".

The Secretary has argued that the application of the Act does not prevent the associates from donating their income back to the Foundation. One must wonder then, what is the Secretary's "compelling interest" when the

associates do not want a wage and when they will simply give whatever they receive back to the Foundation.

The Secretary also argues that the activities of the Foundation may be considered commercial in nature, and that the Act accordingly applies. The petitioners, however, earnestly state that their activities are exempt from the application of the Act because they are conducted exclusively for religious purposes.

In the case of *Follett v. Town of McCormick, SC.*, 321 U.S. 573, 64 S. Ct. 717 (1944), such conflicting contentions were presented to this Court. The appellant (Follett) was convicted of violating an ordinance of the town of McCormick, which provided:

> [T]he following license on business, occupations and professions to be paid by the person or persons carrying on or engaged in such business . . . within the corporate limits of the Town of McCormick, South Carolina: Agents selling books, per day $1.00, per year $15.00. *Id.* at 64 S.C. 717.

Follett was a Jehovah's Witness and was ordained as a minister by the Watch Tower Bible & Tract Society. He went from house to house selling books. He obtained his living from the money received; *he had no other source of income.* He admittedly had no license and refused to obtain one, claiming that the ordinance restricted freedom of worship in violation of the First Amendment. In reversing the appellant's conviction, this Court, after finding the books the appellant sold to be religious in content, stated:

> We must accordingly accept as bona fide appellant's assertion that he was "preaching the gospel" by going "from house to house presenting the gospel of

> the kingdom in printed form". *Thus we have quite a different case from that of a merchant who sells books at a stand or on the road.*
>
> . . .
>
> *The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker. Id.* at 64 S. Ct. 719. (emphasis ours)

As in *Follett*, this Court was presented with the commercial/religious question in *Murdock v. Com. of Penn.*, 319 U.S. 105, 87 L. Ed. 1292, 63 S. Ct. 870 (1943). In viewing religious activity that could be argued to be commercial in nature, this Court held:

> Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital.
>
> . . .
>
> But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project.
>
> . . .
>
> It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses

or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. 319 U.S. at 111, 63 S. Ct. at 874.

As stated above: "[A]n evangelist . . . does not become a mere book agent by selling the Bible or religious tracts to help him defray his expenses or to sustain him." Likewise, the petitioner Foundation does not become a commercial enterprise or an employer by engaging in activities to generate income to pay expenses necessarily incurred in its efforts to spread the Gospel, and the petitioner, Larry LaRouche, and the other associates do not become "employees" merely by involving themselves in activities, commercial in nature, while pursuing religious goals.

To stamp the labels of "employer", "employee", and "employment" upon the associates' affiliation with the petitioner Foundation and to impose upon such affiliation the regulations set forth in the Fair Labor Standards Act is to deny the petitioner, Larry LaRouche, and the other associates of their right to freely *contribute* their time and effort to religious endeavors and to deny them of their right to live in the religious setting of the Foundation, which is based upon a person's desire to freely and entirely give himself to God's work. The Secretary's request for the imposition of minimum wage and overtime compensation ignores the desires of the Foundation and its associates to continue this Christian ministry, which is knowingly made possible only by the volunteer efforts of the associates. In short, the imposition of the aforesaid Act and its regulations upon the Foundation and its activities will quickly lead to the demise of this Christian effort. It is common knowledge that charitable organizations and

their projects or programs exist only because of volunteer help. Such application is in violation of the right of the petitioner, Larry LaRouche, and the other associates, to freely exercise their religious beliefs.

V.

Application Of The Fair Labor Standards Act To The Petitioners Is Violative Of The Establishment Clause Of The First Amendment To The United States Constitution.

In addition to the minimum wage and overtime provisions (29 U.S.C. §§ 206, 207), the Fair Labor Standards Act provides:

> Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him and shall preserve such records for such period of time, and shall make such reports therefrom to the Administrator. . . . (29 U.S.C. § 211(c))

29 C.F.R. § 516.1, *et seq.*, not only details the information to be included in the above-noted records, but also notes the following requirement: "All records shall be open at any time to inspection and transcription by the Administrator or his duly authorized and designated representative." 29 C.F.R. § 516.7(b).

The Secretary desires to impose such provisions upon the petitioner Foundation. These provisions place the Foundation and its associates under constant government-

al supervision. The effects of such governmental scrutiny are to (1) inhibit the efforts of the associates in their desire to "spread the Gospel" and (2) to entangle this religious effort with governmental regulations. Consequently, the application of the Act in this case violates the Establishment Clause of the First Amendment.

The Establishment Clause of the First Amendment commands that "Congress shall make no law respecting an establishment of religion. . . ." "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'." *Everson v. Board of Education*, 330 U.S. 1, 16, 91 L. Ed. 711, 67 S. Ct. 504 (1947). It is well settled, however, that not all governmental involvement with religion is forbidden.

In the case of *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), this Court enunciated the following three tests that had developed in determining whether the involvement of government with religion is forbidden or permitted:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citations omitted]; finally, the statute must not foster "an excessive government entanglement with religion". *Id.* at 755, 756.

The Act in question has a secular legislative purpose; however, a primary effect of the Act, if it is to be applied as the Secretary desires, is to seriously inhibit religious activity, which is accomplished through the efforts of volunteers.

It is common knowledge that charitable and religious organizations would not be able to provide the services they currently make available if it were not for the labor of volunteers.[3]

Furthermore, the regulation of religious activity of the Foundation and its associates as proposed by the Secretary fosters excessive government entanglement with religion. Government regulation in this area would prohibit one from freely contributing his time and effort to a religious organization and would require detailed record-keeping of all activity, such records being subject to constant review by Department of Labor officers. If the Secretary is successful in imposing the Act upon the defendants, one must ask whether churches in America must pay the minimum wage to its volunteer workers who regularly cook the dinner meal for the church members on Sunday and Wednesday nights prior to prayer meetings.

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[3] No one is sure how many Americans actually do volunteer work each year, however as noted in W. V. Thomas, *Volunteerism in the Eighties*, 1980 (published by Congressional Quarterly, Inc.), at page 907: "A 1979 Gallup Poll indicated that 70 percent of the nation's adults were willing to participate in neighborhood betterment activities or assist in social service tasks. The last major study of volunteering, conducted in 1974 by ACTION, the federal volunteer agency, and the U.S. Census Bureau, found that 24 percent of the population—or 37 million people over the age of 13—were volunteering their time and effort in one way or another. The study, "Americans Volunteer: 1974", said that volunteers worked an annual total of 137 million hours, the equivalent of 3.4 million people working a 40-hour week. However, the survey only covered the activities of organized vounteers, and much of the volunteer and charity work done in the United States is spontaneous. The American Association of Fund-Raising Counsel, a private philanthropy research group, estimates that if informal volunteers were counted along with organized volunteers, the total would be as high as 68 million people each year."

Will a church be forced to pay such wages despite the workers' refusal to accept the same? Will records be required? If so, will they be subject to constant supervision by the Secretary of Labor? Will a church be forced to pay minimum wage to and keep records for the individual who donates two full weeks of every year to assist in carpentry work around the church or around one of its missions? Is such individual an employee if the Church provides housing and food for the individual during those two weeks? Will a church be required to keep records of all volunteers' activities? The answers to each of the above questions must be answered in the affirmative if the Secretary is successful in his cause now before the Court. Consequently, the church and its activities will be excessively entangled with government regulation. The effect of the imposition of the Act upon volunteer workers for a religious organization would be to produce a continuing day-to-day relationship between a church (and its policies) and the Government. Such relationship is prohibited by the Establishment Clause of the First Amendment.

VI.

The Application Of The Fair Labor Standards Act To The Petitioner Is Violative Of The Equal Protection Component Of The Due Process Clause Of The Fifth Amendment To The United States Constitution.

The fact that the associates intended to volunteer their services to the Foundation is undisputed. The testimony of the associates, who represented all other associates, left little doubt as to their intentions and expectations. Even the former associates who had become

disillusioned with the Foundation were found to have considered themselves "volunteers" of their services while at the Foundation. (*See, Memorandum and Order,* Appendix A, App. 7.) Despite this evidence, the Secretary seeks to impose the terms and provisions of the Fair Labor Standards Act upon the volunteers and upon the organization utilizing their services.

The application of the Act to the petitioners denies them the equal protection of the law that is guaranteed to them through the equal protection component of the Fifth Amendment.[4]

It is admitted that the volunteers of the Foundation receive room, board, medical care, and clothing from the Foundation. As a result of these provisions, the Secretary attempts to justify his application of the Act; however, such provisions are similar to those given to the workers in the special volunteer programs supervised by the ACTION agency (the principal agency in the Federal government for administering volunteer service programs).[5]

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[4] This Court has declared that it often tests the validity of federal legislation under the due process clause of the Fifth Amendment by the same rules of equality that are employed to test the validity of state legislation under the equal protection clause of the Fourteenth Amendment.

[5] ACTION is the principal agency in the Federal Government for administering volunteer service programs. ACTION includes Peace Corps, VISTA (Volunteers in Service to America), the Foster Grandparent Program, RSVP (Retired Senior Volunteer Program), the Senior Companion Program, and the National Center for Service Learning.

Each ACTION volunteer receives a food and lodging allowance, a personal living allowance of $75.00 per month, an adjustment allowance to cover the initial cost of securing and setting up living quarters, and at the conclusion of his term of service a stipend of $50.00 for each month of service. 45 C.F.R. § 1213.3-1(a)-(d). In addition, such volunteer receives transportation (45 C.F.R. § 1213.3-2), health benefits (45 C.F.R. § 1213.3-3), legal support (45 C.F.R. § 1213.3-5), and vacation leave (45 C.F.R. § 1213.3-6).[6] Notwithstanding the receipt of these benefits, the ACTION volunteer "shall not be deemed Federal employees and shall not be subject to the provisions of laws relating to Federal officers and employees and Federal employment". 42 U.S.C. § 5055. Thus, the ACTION volunteer falls outside the definition of an "employee" as set forth in the Fair Labor Standards Act. 29 U.S.C. § 203(e)(1). Despite their volunteer status, the ACTION workers are committed to a full year of service (45 C.F.R. § 1213.2-1) and must be "available for service without regard to regular working hours seven days a week except for periods of approved leave (45 C.F.R. § 1213.2-5). Furthermore, the ACTION volunteer must be ready to perform any work assignments as may be determined appropriate by the ACTION Director (42 U.S.C. § 4953 (c)).

In view of the fact that the associate of the Foundation is free to leave the Foundation at any time, free to work when and where he desires, and free to leave his job

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[6] "Provisional volunteer" under ACTION Programs do not receive any allowance nor do they accrue stipends. They receive only their food and lodging and "a nominal amount of money for living expenses". 45 C.F.R. § 1213.3-1(e).

to witness or pray, it is difficult to see the rationale for treating the Foundation's volunteers as employees under the Fair Labor Standards Act while excusing the ACTION volunteers.

The constitutional guarantee of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. (*See, Hartford Steam Boiler Inspection and Ins. Co. v. Harrison*, 301 U.S. 459, 81 L. Ed. 1223, 57 S. Ct. 838 (1937).) This principle has been stated to include within its purview of equality exemptions from liabilities. (*See, Cotting v. Godard*, 183 U.S. 79, 46 L. Ed. 92, 22 S. Ct. 30 (1901). Certainly, the petitioners recognize that the equal protection clause does not protect against all distinctions made in legislation or the application of the same. Equal protection in its guaranty permits classification that is reasonable and not arbitrary and which is based upon material differences having a reasonable relation to the person involved and to the public purpose sought to be achieved by the legislation in question.

The purpose of the Fair Labor Standards Act is stated to be the elimination of various labor conditions that are "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (29 U.S.C. § 202). It is impossible to see the basis for finding the Foundation's volunteers a threat to the Act's purpose while allowing the ACTION volunteers to operate beyond its reach. Furthermore, it is common knowledge that all religious organizations use the services of volunteers. Many of their activities may be viewed as commercial in nature.

The difficulty in justifying the unequal treatment becomes even greater when one considers the workers who are expressly exempt from the minimum wage and overtime requirements of the Act. The following are just a few of such exemptions: any employee who is employed in domestic service (29 U.S.C. § 213(a)(21); any employee employed in a bona fide executive, administrative, or professional capacity . . . (29 U.S.C. § 213(a)(1); any employee employed by any retail or service establishment . . . if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located and such establishment is not an enterprise. . . . (29 U.S.C. § 213 (a)(2))

The attempted application of the Fair Labor Standards Act to the petitioners is an arbitrary action, and such bears no reasonable relation to the purpose sought to be achieved by the Act. Consequently, the application of the Act to the petitioners is violative of the equal protection component of the Due Process Clause of the Fifth Amendment.

CONCLUSION

In light of the above, the petitioners respectfully request this Court to reverse the decisions of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the Western District of Arkansas.

Respectfully submitted

GEAN, GEAN & GEAN
First America Building
Suite 500, 524 Garrison Avenue
Fort Smith, Arkansas 72901
By ROY GEAN, JR.

APPENDIX D

[For Appendix A, B, or C, see Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, herein docketed on May 25, 1984.]

DEFENDANT'S EXHIBIT 28

1. Articles of Incorporation of Tony and Susan Alamo Foundation (A Non-Profit Corporation) (Defendants' Exhibit 28)
2. Certificate of Amendment of Articles of Incorporation of Tony and Susan Alamo Foundation, A California Corporation (Defendants' Exhibit 29)
3. Secretary of State of the State of Arkansas Certificate of Incorporation of Foreign Non-Profit Corporation, Tony and Susan Alamo Foundation (Defendants' Exhibit 30)
4. Internal Revenue Service Determination Letter of December 18, 1974, Noting the Tax-Exempt Status of the Tony and Susan Alamo Foundation (Defendants' Exhibit 31)

ARTICLES OF INCORPORATION OF TONY AND SUSAN ALAMO FOUNDATION (A Non-Profit Corporation)

(Filed January 29, 1969)

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, have this day voluntarily associated ourselves together for the purpose of organizing a corporation under Part 1 of Division 2 of the Cor-

porations Code of the State of California, also known as the General Non-Profit Law, and we do hereby certify:

ARTICLE I

The name of the Corporation is
TONY AND SUSAN ALAMO FOUNDATION

ARTICLE II

1. The specific and primary purposes for which this corporation is organized under the meaning of Section 501(c)(3) of the United States Internal Revenue Code are:

(a) To establish, conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue, and charity.

(b) To carry on and to conduct schools for the study of the Holy Bible, to organize churches and missions subsidiary to the parent corporation and to educate, ordain, support and appoint ministers, evangelists, missionaries and workers in connection therewith, and, in pursuit thereof, to establish branch societies through its officers and agents appointed and delegated for that purpose in different states and territories of the United States.

(c) To secure the Americanization of the foreign born; to provide for the educational and industrial welfare of the poor and neglected by the inspiration of industrial education and mental and spiritual uplift and by the encouragement of thrift and helpful conditions of living and labor, to endeavor to prevent pauperism; by means of Christian cooperation to relieve the temporary

distresses of the unfortunate; to build, equip and operate trade schools and workshops and co-ordinate with allied institutions; to establish and conduct charitable medical facilities; to carry on educational and other charitable and non-profit projects relating to welfare and benevolent work among the poor and needy; and to assist by gifts, grants, or otherwise, other corporations, funds, trusts, and foundations in the carrying on of any projects relating to said religious program.

2. In furtherance of and as limited by its specific and primary purposes, the corporation shall have the following powers in addition to the powers conferred by law, provided, however, that any activity engaged in pursuant to those powers which is not in furtherance of the specific and primary purposes of the corporation as aforesaid, shall not exceed an insubstantial part of the activities of the corporation:

(a) To solicit, collect, receive, acquire, hold and invest money and property, both real and personal, received by gifts, donation, contribution, bequest, devise or otherwise; to sell and convert property, both real and personal, into cash and to invest as the Board of Directors of the corporation deem necessary or expedient; and to use the funds of this corporation and the proceeds, income, rents, issues and profits derived from said properties for the purposes for which this corporation is formed.

(b) To purchase or otherwise acquire, own, hold, use, lease (either as lessor or lessee), sell, exchange, assign, convey or otherwise dispose of and mortgage or otherwise hypothecate or encumber real and personal property.

(c) To borrow money and incur indebtedness, and to secure the repayment of the same by mortgage, pledge, deed of trust, or other hypothecation of property, both real and personal.

(d) To issue bonds, notes, debentures and other negotiable or non-negotiable instruments and securities.

(e) To hold, purchase or otherwise acquire, sell, assign, transfer, pledge, hypothecate or otherwise dispose of bonds, notes or other evidence of indebtedness of any corporation or individual and of shares of capital stock of any corporation.

(f) To act as trustee under any trust incidental to the principal objects of the corporation, and to receive, hold, administer and expend funds and property subject to such trust.

(g) Nothing herein contained shall be construed as authorizing, or intending to authorize, the performance at any time of any act, or acts, that are unlawful for a non-profit corporation.

(h) And, lastly, to do and perform every act or thing, which may be necessary, expedient, incidental to, or proper, or which may be by its Board of Directors deemed necessary, expedient, incidental to, or proper, to the carrying on of the work of the corporation.

(i) Sub-paragraphs (a) through (h) inclusive, of this Paragraph 2 of Article II, as hereinabove set forth, shall be construed as separate statements conferring independent purposes and powers upon the corporation, and the statements contained in each

Clause of said Sub-paragraphs shall not be limited by references to or inferences from one another.

(j) Notwithstanding any of the above statements of purposes and powers, this corporation shall not engage in activities which in themselves are not in furtherance of the religious purposes set forth hereinabove.

ARTICLE III

That this corporation is organized pursuant to the General Non-profit Corporation Law of the State of California and is not organized, nor shall it be operated, directly or indirectly, for pecuniary gain or profit. There shall not be any distribution of gains, profits or dividends, or other assets to the members thereof or to any officer, director or individual. The property, assets, profits and income of this corporation are irrevocably dedicated to religious and/or charitable purposes and no part of the profits or income or assets of this corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private shareholder or individual. Upon the dissolution, liquidation, or winding up of this corporation, or upon abandonment, the assets of this corporation remaining after payment of or provision for all debts and liabilities of this corporation shall be donated to such non-profit corporation or corporations, association or associations, fund or funds, or foundation or foundations, as the directors of this corporation may designate; provided that no portion of such assets shall be donated to any organization other than one organized and operated exclusively for religious and/or charitable purposes and which has established its tax-exempt status under Section

501(c)(3) of the Internal Revenue Code. If this corporation holds any assets in trust, such assets shall be disposed of in such manner as may be directed by decree of the Superior Court of the county in which the corporation's principal office is located, upon petition therefor by the Attorney General or by any person concerned in the liquidation, in proceedings to which the Attorney General is a party.

ARTICLE IV

The county in the State of California where the principal office for the transaction of the business of the corporation is located is the County of Los Angeles.

ARTICLE V

1. The Board of Directors of the corporation shall be known and described as the Board of Directors, and that the Directors of this corporation shall be known and described as Directors.

2. The number of Directors of the corporation shall be three (3) until such number is changed by an amendment to those Articles of Incorporation or by a By-Law adopted by the members.

3. The names and addresses of the incorporating Directors of the corporation who are to serve as Directors until the election of their successors as provided by law, are as follows:

NAME	ADDRESS
SUSAN ALAMO	1932½ Cahuenga Hollywood, California 90028

TONY ALAMO	1932½ Cahuenga Hollywood, California 90028
PHYLLIS GROMOUSKY	1932½ Cahuenga Hollywood, California 90028

ARTICLE VI

This corporation shall have such membership or classes thereof as may be specified in its By-Laws.

ARTICLE VII

This corporation shall not carry on by propaganda or other advocate or act with the view of, directly or indirectly, influencing legislation of any kind or character of any public or other governmental agency. None of the funds or other assets of this corporation shall be used, directly or indirectly, for partisan political purposes or to promote or advocate the candidacy or appointment of any persons seeking election or appointment to any public office.

ARTICLE VIII

In furtherance and not in limitation to the powers conferred by the laws of the State of California, the Board of Directors is hereby authorized:

To make, alter, amend or repeal the By-Laws of the corporation, provided, however, that the members shall also have authority to make, amend or repeal any By-Laws, and any By-Laws passed, amended or repealed by the members in the manner provided in the By-Laws shall control and take precedence over any By-Laws or regulations passed by the Directors.

ARTICLE IX

Nothing in these Articles of Incorporation, including Article XI, shall be interpreted as permitting a change to a nonexempt purpose or the distribution of assets to a nonexempt organization.

ARTICLE X

The existence of this corporation is to be perpetual.

ARTICLE XI

This corporation reserves the right to amend, alter, change or repeal any provision contained in these Articles of Incorporation in the manner now or hereinafter prescribed by statute, and all rights conferred on members herein are granted subject to this reservation.

IN WITNESS WHEREOF, we, the undersigned Incorporators, including each person named in the foregoing Articles of Incorporation as the First Directors of said corporation, have executed these Articles of Incorporation this 16th day of December, 1968.

/s/ Susan Alamo
/s/ Tony Alamo
/s/ Phyllis Gromousky

COUNTY OF LOS ANGELES)
) SS
STATE OF CALIFORNIA)

On this 16th day of December, 1968 before me, the undersigned, a Notary Public in and for said County and State, personally appeared SUSAN ALAMO, TONY ALAMO, and PHYLLIS GROMOUSKY, known to me to be the persons whose names are subscribed to the foregoing

Articles of Incorporation, and acknowledged to me that they executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
S. A. ADAIR
Notary Public-California
Principal Office In
Los Angeles County

/s/ S. A. Adair
Notary Public in and for said County and State.

My commission expires:
January 22, 1971

DEFENDANT'S EXHIBIT 29

CERTIFICATE OF AMENDMENT OF ARTICLES OF INCORPORATION OF TONY AND SUSAN ALAMO FOUNDATION A CALIFORNIA CORPORATION

(Filed in the Office of the Secretary of State of the State of California June 20, 1975)

MARCH FONG, EU, Secretary of State
/s/ James E. Harris, Deputy

TONY ALAMO and SUSAN ALAMO certify:

1. That they constitute at least two-thirds of the incorporators of TONY AND SUSAN ALAMO FOUNDATION, a California corporation.

2. That they hereby adopt the following amendment of the Articles of Incorporation of said corporation. ARTICLE II, paragraph 1(c) is amended to read as follows:

"(c) To secure the Americanization of the foreign born; to provide for the educational and industrial welfare of the poor and neglected by the inspiration of industrial education and mental and spiritual uplift and by the encouragement of thrift and helpful conditions of living and labor, to endeavor to prevent pauperism; by means of Christian cooperation to re-

lieve the temporary distresses of the unfortunate; to co-ordinate with allied institutions; to carry on educational and other charitable and non-profit projects relating to welfare and benevolent work among the poor and needy; and to assist by gifts, grants, or otherwise, other corporations, funds, trusts, and foundations in the carrying on of any projects relating to said religious program.

3. That said corporation has admitted no members other than the incorporators.

/s/ TONY ALAMO
Incorporator

/s/ SUSAN ALAMO
Incorporator

STATE OF ARKANSAS)
) ss.
COUNTY OF CRAWFORD)

TONY ALAMO and SUSAN ALAMO being duly sworn depose and say:

They are the incorporators who have signed the foregoing Certificate of Amendment of Articles of Incorporation; they have read said document and know the contents thereof; and the same is true of their own knowledge.

/s/ TONY ALAMO
Incorporator

/s/ SUSAN ALAMO
Incorporator

Subscribed and sworn to before me
on June 9, 1975.

Myrtle E. Thompson,
Notary Public for the State of Arkansas,
County of Crawford.

My Commission Expires December 1, 1976.

DEFENDANT'S EXHIBIT 30

STATE OF ARKANSAS
DEPARTMENT OF STATE

George O. Jernigan, Jr., Secretary of State

CERTIFICATE OF INCORPORATION OF
FOREIGN NON-PROFIT CORPORATION

I, George O. Jernigan, Jr., Secretary of State of the State of Arkansas, Do Hereby Certify, that

TONY AND SUSAN ALAMO FOUNDATION

has filed in the office of the Secretary of State, a duly certified copy of its Articles of Association in compliance with the provisions of the law, with their petition for incorporation under the name or style of

TONY AND SUSAN ALAMO FOUNDATION

they are therefore hereby declared a body politic and corporate, by the name and style aforesaid, with all the powers, privileges and immunities granted in the law thereunto appertaining.

In Testimony Whereof, I have hereunto set my hand and affixed my official Seal

This 23rd day of August, 1976
GEORGE O. JERNIGAN, JR.

Secretary of State.

(SEAL)

By /s/ Carolyn Greene, *Deputy.*

DEFENDANT'S EXHIBIT 31

INTERNAL REVENUE SERVICE
Washington, DC 20224
Date: December 18, 1974
In reply refer to:
E:EO:T:R:1-2

Tony and Susan Alamo Foundation
13136 Sierra Highway
Saugus, California 91350

Employer Identification Number: 23-7165422
Key District: Los Angeles

Accounting Period Ending: December 31
Form 990 Required: × Yes

Dear Applicant:

Section 508(a)(2) of the Internal Revenue Code of 1954 states that an organization organized after October 9, 1969, shall not be treated as an organization described in section 501(c)(3) for any period before the giving of notice that it is applying for recognition of exempt status, if such notice is given after the time prescribed by regulations.

Section 1.508(a)(2)(i) of the Income Tax Regulations states that an organization seeking exemption under section 501(c)(3) must file the notice described in section 508 (a) within 15 months from the end of the month in which the organization was organized, or before March 22, 1973, whichever comes later. Such notice is filed by submitting a properly completed and executed Form 1023, exemption application, with the District Director.

Our records indicate that we received notice on May 1, 1974, which is more than 15 months from the date on which you were incorporated. Therefore, the provisions of section 508(a)(2) are applicable to you.

Based on information supplied, and assuming your operations will be as stated in your application for recognition of exemption, we have determined you are exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code for years beginning May 1, 1974.

We have further determined you are not a private foundation within the meaning of section 509(a) of the Code, because you are an organization described in sections 509(a)(1) and 170(b)(1)(A)(vi) for years beginning May 1, 1974.

You are not liable for social security (FICA) taxes unless you file a waiver of exemption certificate as provided in the Federal Insurance Contributions Act. You are not liable for the taxes imposed under the Federal Unemployment Tax Act (FUTA).

Since you are not a private foundation, you are not subject to the excise taxes under Chapter 42 of the Code. However, you are not automatically exempt from other Federal excise taxes.

Contributions made to you before May 1, 1974, are not deductible under section 170 of the Code. Donors may deduct contributions to you as provided in section 170 of the Code for years beginning May 1, 1974. Bequests, legacies, devises, transfers, or gifts to you or for your use made on May 1, 1974, and thereafter, are deductible for Federal estate and gift tax purposes if they meet the applicable provisions of sections 2055, 2106, and 2522 of the Code.

If your purposes, character, or method of operating is changed, you must let your key District Director know so he can consider the effect of the change on your exempt status. Also, you must inform him of all changes in your name or address.

The block checked at the top of this letter shows whether you must file Form 990, Return of Organization Exempt From Income Tax. If the Yes box is checked, you are required to file Form 990 only if your gross receipts each year are normally more than $5,000. If a return is required, it must be filed by the 15th day of the fifth month after the end of your annual accounting period. The law imposes a penalty of $10 a day, up to a maximum of $5,000, for failure to file the return on time.

You are not required to file Federal income tax returns unless you are subject to the tax on unrelated business income under section 511 of the Code. If you are subject to this tax, you must file an income tax return on Form 990-T. In this letter we are not determining whether any of your present or proposed activities are unrelated trade or business as defined in section 513 of the Code.

Please use your employer identificatoin number on all returns you file and in all correspondence with the Internal Revenue Service.

—3—

This ruling is conditioned upon the receipt of your amended Articles of Incorporation, as proposed in our letter of October 4, 1974, which you agreed to on November 11, 1974. The copy which you submit must show that the amendment was filed with the appropriate State Official and the date thereof.

We are informing your key District Director of this action. Please keep this ruling letter in your permanent records.

Sincerely yours,

/s/ Milton Cerny

Chief, Rulings Section 1
Exempt Organizations
Technical Branch